Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CHRISTOPHER MICCICHE,	)	
Employee	)	OEA Matter No. 1601-0019-18
	)	
v.	)	Date of Issuance: January 10, 2020
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
	)	

F. Douglas Hartnett, Esq., Employee Representative
Ronald Harris, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 29, 2017, Christopher Micciche ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the Metropolitan Police Department's ("MPD" or the "Agency") adverse action of demoting him from the rank of Captain to Lieutenant and suspending him for 20 days. Agency effectuated the instant adverse action based on charges of Conduct Unbecoming, Misuse of Official Position and Prejudicial Conduct. In a nutshell, the acts that gave rise to Employee's predicament center around allegations that Employee in his former official capacity as Deputy Director of Agency's Medical Services Division improperly accessed the confidential medical records of his fellow members and failed to properly secure members' confidential records in a manner that would reasonably insure their privacy. Employee denies these allegations asserting that he was authorized to view the subject members' medical records and that the records that were alleged to have been improperly secured were adequately secured. Upon review, the parties proceeded through a course of Prehearing and Status Conferences in order to best ascertain the proper course of adjudicating this matter. An Evidentiary Hearing was held on August 28, 2018. Thereafter, the parties provided their written proposed findings of facts and conclusions of law. After thorough review, I find that no further proceedings are necessary. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

ISSUES

Whether the Agency's adverse action was taken for cause. If so, whether the penalty was appropriate under the circumstances.

Statement of the Charges

1. **Conduct Unbecoming** – Violation of General Order Series 120.21, Attachment A, Part A-12, which states, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia."

   Specification No. 1 - In that, on March 28, 2017, while assigned as the Deputy Director of the Medical Services Division, you accessed your PHI[1] in PFC's Centricity EMR system. You did this in spite of having signed an Acceptable Use Agreement that stated it was unlawful for you to view your own PHI.

2. **Misuse of Official Position –** Violation of G.O. 120.21, Attachment A, Part A-20

[1] Protected Health Information hereinafter denoted as "PHI".

Specification 1 - In that, on various dates in 2016 and 2017, in your role as the Deputy Director of the Medical Services Division you accessed the PHI of multiple members of the Department. On May 8, 2017, you attempted to use information you had gained from viewing members' PHI to influence the treatment you received from the PFC.

3. **Prejudicial Conduct** – Violation of G.O. 120.21, Attachment A, Part A-25

Specification 1 – In that on May 11, 2017, agents of the Internal Affairs Division (IAD) located printed PHI documents of two MPD members in an unsecured location inside of your office at the Medical Service Division. As such, you failed to properly safeguard the PHI of the involved members.

SUMMARY OF MATERIAL TESTIMONY

Olusola Malomo (Tr. 10-57).

Olusola Malomo ("Malomo") worked as a Medical Director for the Police and Fire Clinic ("PFC") Associates LLC. She was the direct supervisor for the physicians, physician assistants, nurse practitioners, and psychologists. Malomo explained that PFC was an occupational medicine practice that catered to D.C. police officers and firefighters. She stated that PFC had a contract with the D.C. Government to provide occupational medicine services to the Metropolitan Police Department ("Agency") and D.C. Fire and Emergency Medical Services. Malomo was responsible for the implementation of policy governing the operations of the clinic.

Malomo testified that on May 8, 2017, psychologist, Dr. Marc Cottrell ("Cottrell") treated Captain Christopher Micciche ("Employee"). Malomo stated that Cottrell told her that he was concerned about Employee because Employee mentioned specific details about the medical treatment and behavioral health of a female officer who worked for Agency.

Malomo stated that Employee was assigned to PFC as the Deputy Director of Agency's Medical Services Division. She explained that it was inappropriate for Employee to discuss the officer's medical treatment with Cottrell. Malomo also stated that it was not clear to her or Cottrell why Employee knew information about another employee's medical treatment. Malomo told Cottrell that she would discuss the issue with Ms. Marian Booker ("Booker"), the Chief Operating Officer and the Privacy Officer for PFC.

Malomo spoke with Booker and told her that she was concerned that Employee had information about behavioral health records of another officer, and Employee did not make a fitness of duty claim. Booker recommended that they perform an audit to determine if Employee accessed the officer's records. Booker told Malomo that she would audit Employee from January through May of 2017. Once the audit was complete, Booker and Malomo discovered that Employee accessed the officer's records multiple times over the course of the previous months. They also noticed that Employee accessed the records of other officers at Agency. Additionally, they realized that Employee printed out multiple medical and behavioral health records of patients. Malomo did not know why Employee accessed the records because of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") regulations which provides data privacy and security provisions for safeguarding medical information. She explained that Employee should have only accessed records as needed. Malomo was also

concerned because Employee had only worked at PFC for less than one year and it was unusual for an employee to access that many records for his duration of employment.

After the audit was reviewed, Malomo informed William Sarvis ("Sarvis"), Agency's Director for the Medical Services Division about Employee's conduct. Malomo told Sarvis that when she and Booker reviewed the audit of Employee's access records they determined that he had accessed more records than any other official. Malomo did not see a medical or operational reason for Employee to access the records. She stated that she and Booker presented the information to Sarvis and he requested that they revoke Employee's access to the behavioral health records.

Malomo asserted that Employee did not follow protocol for having the records printed because he never requested the information. She explained that the protocol for maintaining the security of medical records was to complete periodic audits of records. If Agency requested any records, they had to submit a records request form, indicate the purpose of the request, and include the date range of the specific records that were requested. Malomo stated that she and the emergency director signed off on the form.

On cross-examination, Malomo reiterated that Employee did not follow protocol for having the records printed because he never requested the information. She stated that PFC did not have authority over Agency employees that worked in the clinic. Additionally, Malomo explained that Agency owned the medical records, but PFC was the custodian of the records. Agency employees were not allowed to print the medical records based on the policy that PFC and Agency had in place. Malomo testified that the medical records were located in a secure building and the offices also required key card access. Malomo stated that there were federal guidelines in place to manage the medical records. Further, Agency was obligated to ensure that PFC performed according to the contract.

On redirect, Malomo testified that if multiple people had keys to the locks, she would not consider the file secured.

Marc Cottrell (Tr. 58-77).

Marc Cottrell ("Cottrell") worked as a psychologist with the Police and Fire Department. He explained that he was responsible for accessing the police officer's post-incident report of a shooting or a casualty event to determine if an officer was ready and able to return to work.

On March 24, 2017, Cottrell treated Employee for a dependency issue. He had three face-to-face sessions with him on April 24, May 1, and May 8 of 2017. On May 8, 2017, Employee told Cottrell that he did not want to complete the fitness of duty evaluation. Employee mentioned information from two other officers and their clinic medical records to bolster his case of why he should not have to go through the evaluation. Employee told Cottrell that one officer was drinking alcohol five times a night and was never evaluated, while another officer was not evaluated for fitness of duty. Cottrell stated that he was stunned about the information that he received during their session. He accessed the system to verify Employee's story and was surprised that Employee's information regarding the officer was accurate.

Cottrell stated that during their session, he advised Employee that he was being under-treated for his condition and that the inpatient stay was too short. Additionally, he explained that

Agency should have transitioned Employee to an ongoing community care for outpatient treatment. Cottrell testified that there was tension between he and Employee after Employee argued against having to complete the fitness of duty evaluation. After their session, Cottrell informed Employee that he would need to be treated by another doctor. Once Employee left, Cottrell found Malomo and informed her about what occurred during the session.

On cross-examination, Cottrell stated that he did not know if the officer who consumed five alcoholic beverages per night remained employed or if the officer was referred for a fitness of duty exam. He also testified that Employee completed and passed the fitness of duty exam.

Marian Booker (Tr. 77-127).

Marian Booker ("Booker") was the Chief Operating Officer at PFC Associates. She ensured that PFC and Agency's employees abided by the confidentiality policies of the clinic. Booker explained that if patients or an individual needed medical records, there was a process. She stated that a medical authorization release form was sent to the clinic Information Technology ("IT") Manager. The IT manager printed out the records, approved the records to ensure accuracy, and then would give them to Malomo to review and sign off on.

Booker stated that Malomo requested that she conduct an audit after Malomo informed her that Employee discussed protected health information about another officer. Booker explained that Malomo was mostly concerned about discussing the behavioral health component and the information that was inside the Behavioral Health Services ("BHS") chart. During the audit, Booker saw that Employee accessed more than fifty charts, which she believed was a violation, and could report the finding to Health and Human Services. However, Booker reported it to Employee's supervisor so that Agency could conduct their own investigation.

Booker testified that Agency's HIPAA officer did not find that Employee was in violation. Therefore, the persons affected by the disclosed information were not notified. Booker explained that according to Agency's HIPAA officer, Employee was not in violation because he told the HIPAA officer that he had authorization to access the records. The HIPAA officer informed Booker that she should have reported it to Health and Human Services.

William E. Sarvis, Jr. (Tr. 128-181).

William E. Sarvis, Jr. ("Sarvis") was the Executive Director of Corporate Support for Agency. He was responsible for overseeing the financial aspects of the contract and ensuring compliance between PFC and Agency. Sarvis explained that as Director, he was responsible to report any HIPAA violations when a breach occurred in their Electronic Management System ("EMS").

Sarvis stated that Booker approached him about Employee. Booker provided Sarvis with a memorandum which described concerns that PFC had. He provided the information he received from Booker to Agency's Internal Affairs Division ("IAD") for review. Tr. 134.

Sarvis met with Malomo and Booker to discuss the HIPAA regulations. He explained that Agency and PFC had individual privacy guidelines that they were required to follow. One of the guidelines required that the incident be reported to Agency's privacy officer, as well as the city's privacy officer, if it was determined to be a serious violation. Sarvis stated that the

protocol for access and security was designed within the EMS to protect the inappropriate release of information. Within Agency, there were written directives that required certain information before a record could be released or viewed.

Sarvis believed that Employee committed a serious violation when he told Cottrell about the medical history of the two officers and their treatment sessions. Sarvis stated that he spoke with Employee and told him that he needed training. He testified that Employee completed the training in October of 2016. The training covered all the aspects of HIPAA and the penalties imposed for violations of the HIPAA. Additionally, Employee signed a service agreement which indicated that he was not to access his own records. Sarvis scheduled weekly conferences with Employee for the first three months. During their meetings, he made sure that Employee was educated on the privacy protocol for other patients.

On cross-examination, Sarvis testified that there was no evidence that any of the medical records that Employee reviewed were released. He also stated that leaving a file on a desk in the building was permissible under HIPAA guidelines. Sarvis did not recall receiving an email from Employee that stated another employee's medical records were on his desk. However, he explained that if Employee left the records on his desk, he would not have an issue because he was confident that Employee took proper precaution to lock his door to make sure that the file was not available to other people.

Sarvis believed that Employee was an intelligent individual, both technically and professionally. He admitted that towards the end of their professional relationship, there were issues with communication. Additionally, Sarvis received complaints from doctors and the staff. He was unsure if Agency determined that Employee violated any HIPAA guidelines, nor did he have input with the investigation.

Sarvis testified that he knew Ms. Lyons ("Lyons") was the privacy officer for Agency. He did not believe that Lyons weighed in on the audit report that PFC produced regarding Employee's conduct. Sarvis recalled that the only involvement that Lyons had was regarding the memorandum dated May 8, 2017. Furthermore, Sarvis stated that Lyons never commented on whether Employee should be removed from his position. She was not involved in the investigation.

On redirect, Sarvis testified that Employee occasionally argued with doctors about their professional opinions. Sarvis explained that Cottrell and a few other doctors informed him about how aggressive Employee was because he disagreed with some of the doctors' assessments on patients who were out of work too long.

On recross examination, Sarvis believed that Employee was aggressive in overseeing the performance of PFC. Additionally, he thought that PFC did not appreciate the oversight that they received from Employee when he challenged them. Sarvis did not believe that Employee was wrong for not agreeing with his doctor during their meeting about his treatment plan. Sarvis did not recall when Employee underwent the fitness of duty exam but knew that it was completed because Employee returned to work full duty.

On redirect, Sarvis stated that he did not receive any complaints from PFC regarding Employee not following his procedures.

Detective John Hendrick (Tr. 186-227).

Detective John Hendrick ("Hendrick") worked for the Internal Affairs Division ("IAD") with Agency. He was assigned to investigate Employee. Hendrick explained that the initial allegation was that Employee accessed numerous police officers' medical records in the Medical Services Division's records system.

Hendrick stated that he and his immediate supervisor Lieutenant Sean Combray ("Combray") conducted an administrative search of Employee's office. The search was initiated as part of the audit that was presented to him, indicating that there were several medical files and reports that were printed. While in the office, they searched Employee's filing cabinets, police equipment that was in his office, and Employee's personal hard drive on his computer. Hendrick also found sensitive medical documents and medical records in a manila file folder that was left on Employee's desk. He stated that the file was shown to Booker, and after her review, she related to Hendrick and Combray that the files should not have been reviewed by Employee. Hendrick recalled seeing two names on the folder that he gave to Booker, but did not recall whether Booker researched the names to verify the individuals.

Hendrick testified that after the search of Employee's office, he conducted interviews with Booker, Malomo, Cottrell, Sarvis, and Employee. After the interviews were conducted, Hendrick found that Employee violated the policy regarding viewing his own medical records; he was in possession of protected health information in an unsecured environment or was not properly secured within his officer; and he used two police officer members' health or treatment for personal gain during his medical treatment appointment with Cottrell. Hendrick further explained that the medical records reviewed as part of the audit revealed that Employee accessed his own medical records. He stated that Employee reasoned that he accessed the documents because he went out of town for a specific treatment and there was no other staff that could assist him. Additionally, Employee was in violation of the Medical Services Division Agreement that states that an individual cannot view their own medical records. The unsecured Protected Health Information ("PHI") documents was also a violation of HIPAA rules that stated that the documents must be secured, locked in a safe, or a file cabinet.

On cross-examination, Hendrick stated that the documents that he found in Employee's office were under lock and key. According to the summary of HIPAA Privacy, Hendrick understood that information needed to be kept in a safe or locked filing cabinet. Safeguards included shredding documents that contained protected health information before discarding them, securing medical records with lock and key or passcode, and limiting access keys or passcodes.

Hendrick concluded that Employee attempted to influence his treatment. He explained that Employee was concerned that he was being made to complete a more progressive treatment compared to the two officers. Hendrick was unsure of the treatment that the other officers received.

On redirect, Hendrick stated that he requested to have access to Employee's personal hard drive, but Employee denied IAD's request.

Inspector Michael Gottert (Tr. 228-268).

Inspector Michael Gottert ("Gottert") was assigned to the Professional Development Bureau with Agency. Prior to that, he was the Director of the Disciplinary Review Division. His primary duty was to determine the penalty for an adverse actions against employees. The recommendations came from IAD.

Gottert was assigned to review the investigative package prepared by Hendrick regarding Employee. After analyzing the *Douglas* factors, Gottert determined that Employee committed numerous violations. He consulted with his director, determined the charge, and wrote a proposed adverse action for Employee's suspension and demotion. However, Gottert was not part of the decision process for the final notice. He explained that the HIPAA violation was a serious charge, but the other charges were not as egregious.

On cross-examination, Gottert stated that the Acceptable Use Agreement provided that Employee was not permitted to review his own medical records. Gottert discussed the proposed penalty with the Executive Director and his supervisor, Kathleen Crinshaw. He did not discuss the penalty with Sarvis.

On redirect, Gottert testified that he searched for other cases similar to Employee and went through documents that were related to the same violations by using a database. He also stated that he looked for similar cases of people with similar rank but found that there were no similar cases to review. Originally, Gottert considered charging Employee with misconduct as a crime, but then decided to charge him with conduct unbecoming of an officer.

Christopher Micciche (Tr. 275-350).

Christopher Micciche ("Employee") worked as a Lieutenant and a Manager at the Records Division with Agency. He explained that he was an Officer for nine years, a Sergeant for four years, and a Lieutenant for four years. Additionally, he was a Captain for three years before he was demoted back to Lieutenant. After Employee was transferred from the Fifth District, he served as Deputy Director of the Medical Services Division. Employee's duties included handling the day-to-day activities of the clinic. He also revamped some of the policies so that Agency could function efficiently. Employee further explained that he made sure that employees received proper care and did not fake their injury or illness.

Employee stated that he had full access to Centricity, a system that electronically managed medical records. He explained that Sarvis did not have access to the system, so Employee had to print out the records to physically show Sarvis. Employee also stated that he was never reprimanded for printing out the records.

Employee testified that in one instance, a patient was in a car accident and about two months after the accident, the patient complained of problems with his jaw, which he had not previously complained of. Employee went into the system to review the patient's medical records and saw that the injury report did not indicate that he had any issues with his jaw. Employee stated that was an example of why he had to view and evaluate the patient's chart for certain injuries.

Employee testified that on March 28, 2017, he informed Sarvis that he had a dependency issue. Employee told Sarvis that he would need to attend a residential program in Boston. He explained that the facility wanted his medical information and he previously provided his only

copy to Malomo to scan into the system at PFC, but never received his copy back. If Employee required medical documentation of specific issues, he would request it from Lieutenant Anderson ("Anderson") and she provided him with the copies. However, on the date he spoke with the rehabilitation facility, they requested the information so that he would be able to start the program immediately. He explained that if Anderson was there, he would have requested it from her. Employee never tried to deny or hide the fact that he reviewed his own records. He did not believe that it was a violation of HIPAA because he thought that he could view and access his medical records, except for specific documents such as a psychological evaluation and laboratory tests.

Employee met with Sarvis and Cottrell and told them that he believed that they should handle patients with dependency issues. Employee explained that Cottrell appeared frustrated because Cottrell did not think that Employee's program provided him with adequate aftercare. Employee informed Cottrell that the program provided him with a psychologist and a psychiatrist, so he believed that he received proper care. Employee told Cottrell that his friend and an officer with Agency went to a rehabilitation program through PFC. When the friend returned home, the rehabilitation facility sent her to a dependency program. She did not receive additional medical care. However, according to Employee, Cottrell did not agree that the program was beneficial to him. Employee believed Cottrell wanted him to attend an outpatient session so Cottrell would not have to supervise Employee's care.

Employee stated that Cottrell wanted him to complete a fitness for duty exam, but Employee was advised by Sarvis that he did not have to. Employee explained that he had to provide a weekly urine screening for alcohol and metabolites.

The last time that Employee accessed a medical record was of an officer who was ill and was rushed to the hospital. Subsequently, Employee learned that the officer was intoxicated. Sarvis directed Employee to complete the administrative investigation preliminary for misconduct because of the officer's intoxication and absence without official leave.

Employee testified that he did not have a lock for his file cabinet. Additionally, he was never informed that he was required to keep files locked. Employee explained that he left a folder on his desk because he was waiting for a supervisor to contact him regarding a patient testing for fitness for duty. When Employee spoke with Malomo, he was questioned about the number of files that had been opened. Employee advised Malomo to speak with Anderson because Anderson was aware that he was responsible for the no-shows. Employee further explained that when he worked for Agency, there were well over one hundred set of no-shows. Every case required him to enter the system to confirm that he had proper documentation. Employee was not aware of employees receiving probation for printing out documents. In fact, Employee asserted that Sarvis did not have an issue with him printing out documents.

On cross examination, Employee confirmed that he signed the acceptable use agreement and two confidentiality agreements, but he did not read it. Employee explained that Agency required that he sign the documents in order to receive access to the PFC database.

Employee was not aware of any written policy with respect to the printing of PHI documents in his capacity as captain and deputy director during his time with Agency and PFC. Employee also stated that he received emails from Dr. Williams requesting him to check the

doctor's notes and he would have to print out the medical records because he would have to refer to something in a patient's record. Employee asserted that there was no other way for him to refer to a patient's medical chart verbatim, or in detail, without having a copy of the record in front of him.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

Conduct Unbecoming

Employee admitted that he signed the PFC Acceptable Use Agreement dated August 16, 2016, which provides as follows:

> "3. I am accessing electronic Patient Health Information (ePHI). In accordance with Federal (HIPAA), state and local law, I am required to protect the confidentiality, integrity and availability of ePHI. If I fail to protect ePHI, I will be subject to criminal and civil penalties under Federal, state and local laws. I also understand that it is unlawful **to view** and/or modify my own ePHI information." (emphasis added) (Agency Exhibit – Tab 4)

Employee explains that he did not carefully read the aforementioned agreement and was previously unaware that he was prohibited from accessing his own ePHI information. Agency noted in it defense of its action that Sarvis provided explicit oral instruction to Employee informing him that he was required to follow PFC guidelines. I find that Employee's explanation, at best, is self-serving. Employee would have the MPD and the Undersigned believe that his transgression as it relates to this specific rubric should be excused due to his inability to carefully read work related documents that he signed. Further, Employee knew that the documents that he executed bore a direct relation to his being authorized to carry out the central functions of his position. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[2] Considering as much, I find that the Agency has met its burden of proof relative to the charge of Conduct Unbecoming.

Misuse of Official Position

Agency asserts that Employee accessed the health records of fellow members for personal reasons. In its Closing Argument, Agency highlights several sections of the record that bolster its contention that Employee had no valid professional reason for accessing certain members' health records. Moreover, it was posited that Employee's disclosure would run afoul of HIPAA mandates precluding disclosure of a person's private medical record or condition

[2] *See Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

without first gaining consent from said person.[3] The following excerpt details Agency's contentions in this regard:

> PFC officials all agreed that Employee's accessing, and printing of records as shown by the audit was very concerning and not in accordance with clinic procedure or practice:
>
> Ms. Vina Santiago (Custodian of Records/Security Officer)
>
> She indicated in her statement that there would never be a valid reason for an MPD liaison member to access medical charts as any information needed could be found in the registration module of the records system. She also opined that the amount of medical records accessed by Employee was abnormal. (FIR) - Attachment 7
>
> Ms. Marian Booker (Chief Operating Officer)
>
> She stated that she could not think of any reason why Employee accessed medical charts of members. She also stated that unless Employee had a medical release waiver, he should not have been printing out any members' medical records. (FIR) – Attachment 8
>
> Dr. Olusola Malomo (PFC Medical Director)
>
> Dr. Malomo testified that the audit revealed that Employee had accessed the medical records of a lot of MPD members; that he had printed out medical and behavioral records of many MPD members including members assigned to the clinic; and that she did not see any reason why he would access that many records. Tr. At 20.
>
> Mr. Sarvis testified that he concurred with Dr. Malomo and Ms. Booker's assessment that Employee's revealing PHI to Dr. Cottrell was a serious violation of HIPAA. Tr. At 137. He testified further that he did not understand why Employee accessed the PHI of the two officers and then reveal the information to Dr. Cottrell. Tr. At 141.[4]

Agency discovered this aberrant use of members records when Employee was trying to influence his own diagnosis with clinicians as he was being treated. More specifically, Employee was being seen and treated by Dr. Cottrell at the PFC and allegedly used the information gleaned from fellow members health records to influence the diagnosis, treatment

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[3] Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). It has two relevant protections for medical/health records. The Privacy Rule, a Federal law, gives you rights over a patients health information and sets rules and limits on who can look at and receive your health information. The Privacy Rule applies to all forms of individuals' protected health information, whether electronic, written, or oral. The Security Rule is a Federal law that requires security for health information in electronic form.

[4] Agency Closing Argument p. 10 (December 3, 2018).

and MPD member requirement to submit for a fitness for duty exam. This conduct perplexed clinic members and was forwarded to Sarvis and MPD for further review and possible sanction.

Employee defended his actions by asserting that he obtained permission from the named members to share their personal health information. He also asserted that he received no tangible benefit from the use and disclosure of this information. Lastly, he contended that through this disclosure he was not actively attempting to influence his diagnosis or treatment.

I find that Employee did not proffer any *credible* evidence or testimony from the members whose information he shared in an effort to rebut Agency's contention that the sharing of their information was not permitted. Further, Employee admitted that he shared the medical/health records in question with Dr. Cottrell while he was being diagnosed for his own medical exam. As with the previous charge and specification, I find Employee's explanation, at best, is self-serving. It strains credulity to accept that Employee did not know that he should not be referencing other members personal health/medical records while being treated for his own issues. I find that Employee's act of sharing the subject members health/medical information to Dr. Cottrell was a prohibited act. I further find that Employee's prohibited sharing of other members health/medical information was done in an apparent attempt to avoid having to take MPD's required fitness for duty examination. Considering as much, I find that the Agency has met its burden of proof relative to the charge of Misuse of Official Position.

Prejudicial Conduct

Agency explains that members of its Internal Affairs Division ("IAD") conducted a search of Employee's assigned office space. During this search, the IAD found printed copies of two MPD members health/medical records on Employee's desk. Agency noted that Employee's office was locked and that the IAD had to go through the front desk to obtain a master key to unlock Employee's office door. To buttress this point, Sarvis noted that HIPAA regulations require reasonable measures be employed in order to safeguard patient privacy. Sarvis considered the mere locking of an office door unreasonable due to the fact that it is well known that the janitorial staff will access the offices in order to clean the premises; Sarvis also noted that the printing of these documents from the secure server and then leaving them unguarded on top of a desk (as opposed to a locked cabinet) would in tandem be considered an unreasonable safeguard. However, Agency was unable to provide any written regulation that defined what constituted "reasonable" safeguards given the instant facts.

Employee countered that there were no written guidelines regarding what constitutes adequate safeguards. He further noted that he methodically locks his office door and that he even goes so far as to place his trash can outside of his office at night so that the janitorial staff would have no credible reason to attempt to enter it when he is not present.

There are multiple layers of security that had to be considered in order to assess whether the safeguarding of information was reasonable considering the record herein. Taking each act on its own, a plausible argument could be made that Employee did not violate patient privacy by taking unreasonable safeguards. However, what occurred here is that Employee accessed known health/medical records on Agency's secure computer network. He then printed these documents

as opposed to just viewing them on the computer screen and leaving that information on Agency's secure computer network. Employee then left the information in his office, on top of his desk. Employee's office was only superficially locked, since access could be garnered by unauthorized persons (e.g. janitorial staff); and Employee did not take an additional safeguard of placing the hard copies in a secure locked cabinet.

First, Employee did not proffer a credible reason for needing the subject members information printed. He had computer access to this information, yet he failed to provide any valid reason why this information needed to be printed in his normal course of business. Also, Employee was aware that the janitorial staff had access to locked offices in the Medical Services Department ("MSD"), which explains his conduct of leaving his trash can outside of his assigned office for the janitorial staff to empty nightly. I am also aware that given certain circumstances, a locked file cabinet could generally suffice as a reasonable safeguard of patient's privacy. Had Employee simply put these printed documents in a locked cabinet or rather never printed them at all, he could have avoided the instant charge. Taking all of these actions as a whole, I find that the Agency has met its burden of proof relative to the charge of Prejudicial Conduct.

Appropriateness of the Penalty

When assessing the appropriateness of the penalty, OEA is not to substitute its judgment for that of the agency. *Stokes v. District of Columbia*, 502 A.2d 1006, 1985 (D.C. 1985). The OEA itself recognized in *Employee v. Agency*, 29 D.C. Reg. 4565, 4570 (1982):

> Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for this Office to specify how the Agency's penalty should be amended. This office is guided in this matter by the principles set forth in *Douglas v. Veterans Administration, [supra]*.

Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Douglas v. Veterans Administration, supra,* 5 M.S.P.B. at 327-328. The "primary discretion" in selecting a penalty "has been entrusted to agency management, not to the [OEA]." *Id.*at 328.

> Selection of an appropriate penalty must . . . involve a responsible balancing of the relevant factors in the individual case. The [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the

> [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.
>
> *Id.* at 332-333. *See also Villela v. Department of the Air Force*, 727 F.2d 1574, 1576 (Fed. Cir. 1984).

In this case, the relevant *Douglas* factors were carefully considered when determining the appropriate penalty for Employee. The demotion and twenty day suspension for the three charges are within the range set forth in the Table of Offenses and Penalties.

Conclusion

On Petition for Appeal, Agency has the burden of proof with regard to material issues of fact based on a preponderance of the evidence. As previously stated under OEA Rule 628.1, preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." During the evidentiary hearing, I found the collective testimony of Agency's witnesses to be both credible and persuasive. I further find that Employee's denial of sanctionable activity or feigned ignorance of work place policy and procedures during his testimony to be self-serving and dismissive. Accordingly, I find that MPD has met its burden of proof with regard to all three charges and specification detailed in this matter. I further find that Agency's action of demoting Employee and suspending him for twenty should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of suspending Employee from service for twenty days and demoting him from Captain to Lieutenant is **UPHELD**.

FOR THE OFFICE:

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Eric T. Robinson, Esq.
Senior Administrative Judge